SUPREME COURT, U. S.

FILED

MAR 21 1975

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term 1974

No. 74-1201

JOSEPH JAVAD MIZANI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

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JOSEPH JAVAD MIZANI,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming judgment of the District Court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported, but is printed in the Appendix attached hereto, *infra*, p. 12.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1975, and jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Petitioner received a fair trial in view of the trial court's cross-examination of a material witness and his comments to the jury.

2. Whether the Prosecutor can circumvent the 5th and 6th Amendments by making prejudicial statements in closing arguments.

STATUTE INVOLVED

21 U.S.C. § 84.1(a)(1):

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or * * *

STATEMENT OF THE CASE

The government's case was presented primarily through the testimony of Special Agent John King of the Drug Enforcement Administration. Agent King testified that he was introduced to the defendant Mizani by a third party. At that time King was acting in an undercover capacity posing as an alleged intermediary for some major drug dealers in the New York City area. It was his testimony that he met with Mr. Mizani in the latter's apartment in Bethesda, Maryland on October 17, 1973 to discuss the purchase of five to ten pounds of cocaine. He indicated that the purchase price would be in the range of one hundred to one hundred fifty thousand dollars.

The agent stated he made several calls to Mizani's apartment between October 22 and 31, 1973, on which oc-

casions he spoke with a person who identified herself as Shirley. Defendant was not at home at these times. King indicated he had few substantive phone conversations with "Shirley", but that he did tell her "Mr. Mizani is holding up our organization". The agent changed this testimony later and stated that he had talked about obtaining a large amount of "stuff" with her.

When he finally made contact with Mizani, King stated he was advised to call back November 4. The agent did so and arrangements were allegedly made to transfer a sample for testing. King related a meeting with Mizani and Miss Sternweiler in the coffee shop at National Airport. He stated that that was the first time he had met Miss Sternweiler. He further testified that Mizani told him that "the ten pounds were ready to move between 5 and 6 o'clock" and produced a sample in tinfoil and passed it across the table. King acknowledged that he did not pay any money for the sample. The sample was slightly in excess of 5.9 grams and contained 2.6% cocaine.

Because of the dilution of the sample, Agent King advised Miss Sternweiler that the "organization" in New York City did not want to buy the ten pounds. The agent claimed that Mizani advised him that another shipment would come in two weeks and that he should call back then. Agent King alleged that he again spoke to Mizani on November 20, 1973, in the bar-restaurant at National Airport. It was his testimony that defendant demanded payment of $350.00 (the amount which Mizani had supposedly paid to get the sample) and became angry and argumentative. King did not explain why it was that defendant began arguing about payment for the cocaine sample in the crowded National Airport restaurant. The agent stated that defendant left hastily refusing to do any other "business" with the agent.

King stated he contacted Mizani again on December

19, 1973 and said he would pay for the sample in the hope that he could "set up a buy" for ten pounds of cocaine. Mizani was to bring a second sample for Agent King to test. A meeting at National Airport was set up. When defendant did not appear at the appointed time, Agent King claimed that he called Mizani's apartment and spoke to the co-defendant. King stated that the co-defendant told him Mizani was on the way to the airport and that "she said if that deal did not go through, if I could not get the cocaine from Mr. Mizani, then she had a connection that would supply cocaine." On cross-examination, the agent contradicted this statement by indicating that the last phone conversation he had with Miss Sternweiler was on October 31, 1973.

Agent King also testified that he met Mizani at National Airport on December 19, 1973 and paid him $350.00 for the sample of cocaine and that the last contact he had with defendant was in January of 1974. The alleged sale of ten pounds of cocaine never materialized. At no time did the agent tape record or electronically transmit conversations in person or by phone with either defendant. Agent King did not explain why he did not obtain the new sample defendant allegedly brought to the airport on December 19. He also acknowledged he brought no money to the airport to pay for the new sample.

For some reason defendant's attorney at the outset of the case indicated to the Court that his client would not be taking the stand.

From that point on during the questioning of the co-defendant and in the prosecutor's summation, comments were made about defendant Mizani which inferred that the defendant Mizani was a member of a large narcotics ring. Never was there any evidence presented to substantiate this charge. The prosecutor knew that since the de-

fendant would not be taking the stand any inferences to the defendant's character could not be contradicted. Defendant Mizani wanted to testify but because of his dark colored skin and his foreign background his attorney felt the jury would not believe his statements. The spirit of the constitution requiring one not to take the stand was violated in the instant case by the prosecutor's comments during the trial.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Fourth Circuit Below Is in Conflict with the Decisions of Other Courts.

The District Court should have dismissed the case against the defendant Mizani prior to sending said case to the jury. The fact that it did not is not surprising since the impartial attitude of the trial judge in questioning the co-defendant, Shirley Sternweiler, clearly indicates the Judge's pre disposed? opinion of the case.

While the trial judge can comment on the evidence he should call attention to the evidence in favor of as well as that against the accused defendant. See *United States v. Hoker,* 483 F.2d 359 (1973), 10 CLB 187. The judge throughout the trial offered expressions of his opinion to the jury. Such judicial expressions of opinion as to guilt were held to be reversible error in *United States v. Stephens,* 486 F.2d 915 (1973), 10 CLB 352. The Court even in its charge to the jury failed to maintain an impartial attitude. At the close of the Court's charge, both counsel for defendant Mizani and counsel for the co-defendant objected to the Court's characterization of the evidence. The basis of this objection was primarily the Court's intonation, phraseology and depiction of the co-defendant's testimony when stating the defense version of the facts. An exam-

ination of the charge reveals that their belief about the Court's intonation, phraseology and depiction was correct.

In reviewing the government's evidence, the Court refers to government agents as "saying", "telling", and "they kept having further negotiations". The Court characterized the government agent's testimony as being "positive and absolute" (i.e., "He says positively, absolutely"). However, when referring to testimony of the co-defendant, Ms. Sternweiler, the Court used phrases that included "supposed to have", "she claims she got several calls".

Clearly, the Court's intonation, phraseology, and depiction of the co-defendant's testimony displayed its prosecutional partiality. In the end, its failure to maintain an impartial attitude resulted in a denial of the defendant and co-defendant's right to a fair trial.

Just as perplexing, was the Trial Court's venture into the realm of the prosecutional function following the government's cross-examination of the Co-defendant Sternweiler.

In examining the co-defendant, the Court proffered the following statements and questions:

> "Do you know that if a person wants cocaine they don't want it next week, they want it then? Do you know enough about cocaine to know that?
>
> I want her to explain that to the jury
>
> . . . You used the word 'coke', 'rip-off' and several other phrases . . . I just want to know from whatever experience you have had or knowledge do you know that when a person wants something for himself or herself, just a quarter of an ounce, that he wants it then, not six weeks later?
>
> Did you have any experience with anybody before coming down from New York to ask a strange girl that they had never seen before to get them cocaine?
>
> . . . It doesn't seem a bit strange to you? . . . Peo-

> ple don't usually come down from New York and ask you to do things, do they? . . . Can you tell the jury why he picked you out of all the girls in Washington to do this?. . .
>
> . . . Can you tell the jury why you didn't ask him for the money, if you were to get it (purchasing the quarter ounce of cocaine for the agent), instead of you personally furnishing your money? Why didn't you ask him for the money? . . .

From the above questioning, it is evident that the Court, instead of clarifying some obscurity in the testimony, chose to pursue a line of cross-examination in an attempt to impeach the witness as well as to indicate his clear disbelief of the defense. In essence, the Trial Judge assumed the role of an advocate for the prosecution.

See *United States v. Cisneros,* 491 F.2d 1068 (5th Circuit. 1974) the Court emphasized that:

> A trial judge must not appear to be a partisan for the prosecution, or in any way exhibit a prosecutor's zeal. (Ctd. at 1074).

Clearly the trial court displayed "prosecutional zeal" when it engaged in its cross-examination of the co-defendant. Its comments in the form of questions—

> Do you know that if a person wants cocaine they don't want it next week, they want it then? Do you know enough about cocaine to know that? Can you tell the jury why he picked you out of all the girls in Washington to do this?. . .

as well as other conclusory statements noted above, transformed the judge into a witness for the prosecution. These incidents where coupled with the Court's statement that the two stories that of the co-defendant and that of the government, "did not jive", made it clear to the jury that he believed the defendants were guilty.

Just as disconcerting, was the trial courts offering of

information in the nature of testimony during its charge rather than merely commenting on the evidence. In summarizing the government's testimony, specifically that of Agent King, the Court said:

> He told you he got in touch with these people (the defendant and co-defendant) through a government informer. That is a person who informs on people engaged in this type of activity.

Defendant suggests that such information as to what an "informant" does was in the nature of testimony by the Court, rather than a comment on the evidence.

The trial court also provided other information, testimonial in nature, which was argumentative and prejudicial to the defendant's case. The Court in depicting the milieu surrounding the enforcement of narcotics laws stated that:

> . . . The evidence does show that the law enforcement personnel of the United States, that is the narcotics agents, have turned to one of the only practical means of detection, that is, the infiltration of drug rings or people suspected to be participating in this activity in a limited participation in their unlawful practices. The Court tells you that such infiltration on the part of the government agents is a recognized and permissible means of investigation. The Court tells you that, therefore, there is nothing unlawful . . .

It is the defendant's contention that government activity in infiltrating drug rings is sometimes conducted unlawfully. Therefore, the statement that the infiltration of drug rings by government agents is a "recognized and permissible means of investigation" and that "there is nothing unlawful" cannot be made without qualifications.

In addition, this above quoted statement represents the Court's viewpoint on a matter which is argumentative. Thus, the Court, by concluding that "there is nothing unlawful" with the government's activities in this case, took

a position on this issue favorable to the government and by so doing prejudiced the defense, particularly the defendant's defense of entrapment. The Court seems to be saying that such infiltration is always recognized and acceptable and by implication, thus, weakened the defendant's defense of entrapment.

Therefore, the Court by instructing the jury that "there was nothing unlawful" with government's activities failed to remain impartial in conducting the trial and, thus, denied the defendant his right to a fair trial.

In denying the co-defendant a fair trial it was denying the defendant Mizani a fair trial because the questioning of co-defendant Sternweiler by both the judge and prosecutor convicted defendant Mizani.

II. The Comment of the Prosecutor Was Severely Prejudicial As It Constituted an Attempt to Introduce Evidence of Another Crime for Which the Defendant Had Not Been Charged.

Ignoring for the moment the fact that there was not basis in the evidence for the prosecutor's statement, severe prejudice to defendant arose from the fact that the statement of the prosecutor was an accusation of subornation of perjury in violation of 18 U.S.C. 1622 and, consequently, an attack on the character of Mr. Mizani. An additional unfavorable inference arises from the fact that the prosecutor suggested that Mr. Mizani was taking advantage of a young woman, the co-defendant, in order to escape punishment.

The prosecutor's statement clearly conveyed to the jury a specific assertion that the defendant was committing another crime in an attempt to avoid punishment for the crime with which he was charged. Similarly, the statement was a clear cut assault upon the character of Mr.

Mizani. In light of the fact that the defendant asserted no affirmative defense, this comment upon his character was highly improper and prejudicial. See, e.g., 1 WIGMORE, EVIDENCE, § § 55 and 57, MCCORMICK, LAW OF EVIDENCE, §157.

III. The Comment of the Prosecutor Was Improper As It Constituted a Comment on the Failure of the Defendant to Take the Stand.

That no man could "be compelled to give evidence against himself" was stated in the first American Declaration of Rights, that of Virginia in 1776. Since that early declaration of the fundamental right of an accused to remain silent, the scope of that privilege has come to include the requirement that such silence may not be commented on either by the prosecutor or by the court. See, e.g., *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965); *Wilson v. United States*, 149 U.S. 60, 37 L. Ed. 650 (1893); 18 U.S.C. 3481. While the law is clear that the government may not directly mention the failure of the accused to testify, the case at hand does not present such a clear cut situation.

In the present case, counsel for the government stated that the defendant "has persuaded that girl to get upon the stand and try to let him out". Thus, the prosecutor did not specifically state that the defendant failed to take the stand. Rather, he argued that the defendant presented a defense through another witness, to-wit: the co-defendant. It is critical to note that the defendant did not in fact take the stand. Mr. Mizani elected to rely solely upon the presumption of innocence that surrounds all those accused of wrong-doing under our system of law.

CONCLUSION

The central issue in this case is whether the defendant Mizani received a fair trial. In view of the trial judge's and prosecutor's conduct during the trial, he did not.

There was a substantial violation of defendant's 5th Amendment right to due process and his 6th Amendment right to confrontation.

Accordingly, petitioner prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Decided February 19, 1975)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-2072

UNITED STATES OF AMERICA,
Appellee,

vs.

JOSEPH JAVAD MIZANI,
Appellant.

No. 74-2073

UNITED STATES OF AMERICA,
Appellee,

vs.

SHIRLEY MADLAINE STERNWEILER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA

Before HAYNSWORTH, *Chief Judge*, and WINTER and FIELD, *Circuit Judges*.

PER CURIAM:

Convicted of the distribution of cocaine in violation of 21 U.S.C. § 841 (a) (1), the defendants principally complain of prejudice in the questioning of Ms. Sternweiler by the trial judge and comments by the prosecutor. We find no error and affirm.

There was testimony by government agents that Mizani delivered to one of them a sample of cocaine preliminary to a much larger sale that was benig negotiated. Ms. Sternweiler was present at the time and was the recipient of several telephone calls from one of the undercover agents who, according to him, was attempting to contact Mizani who shared the same apartment with Ms. Sternweiler.

At the trial, Ms. Sternweiler took the stand to testify that she was persuaded by the undercover agent to deliver to him the packet of cocaine for his own personal use, not as a sample of a larger purchase, that she paid for it with her own money, and that she delivered it to the undercover agent at the Washington National Airport without, however, receiving payment from the agent. Mizani, she said, went with her to the airport and was present at the time of the transfer of the cocaine, but did not know what she was doing until after the event and then reproved her for what she had done.

The District Judge questioned her about the long delay between the initial conversations and the delivery of the cocaine and the bearing of such delay upon a retail sale for the personal use of a buyer. The questioning was appropriate in light of the government's testimony that all of the negotiations related to a large wholesale transaction. We find no such appearance of bias or unfairness in the questioning as to warrant a new trial.

Nor do we find any unfairness in the fact that the prosecutor, in argument to the jury, suggested that the

personal relationship between the two defendants gave the girl a motive to lie in order to exonerate her lover. The conflicting versions of the transactions made the prosecutor's suggestion a permissible inference which he was entitled to point out to the jury.

Nor was there any unfairness in the prosecutor's reference to Mizani's role as a trafficker in drugs. The government's testimony showed that he had boasted of his ability to procure and wholesale large amounts of drugs, and this was a matter for fair comment by the prosecutor.

Upon consideration of the record, the briefs and argument of counsel, we find no reversible error.

AFFIRMED.

JUDGMENT OF THE COURT OF APPEALS

(Issued February 19, 1974)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2072

UNITED STATES OF AMERICA,
Appellee,

vs.

JOSEPH JAVAD MIZANI,
Appellant,

No. 74-2073

UNITED STATES OF AMERICA,
Appellee,

vs.

SHIRLEY MADLAINE STERNWEILER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the U.S. District Court for the Eastern District of Virginia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the Judgment of the said District Court appealed from in this case be and same is hereby affirmed.

/s/ WILLIAM K. SLATE II
Clerk